

1 THE HONORABLE RICARDO S. MARTINEZ
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7 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8 DOUGLAS LACY, on behalf of himself and
all others similarly situated,

9 Plaintiff,

10 v.

11 COMCAST CABLE COMMUNICATIONS,
LLC,

12 Defendant.

13 Case No. 3:19-cv-05007-RSM

14 **FURTHER JOINT STATUS REPORT AND
CASE MANAGEMENT ORDER**

JOINT STATUS REPORT

Pursuant to LCR 16 and this Court’s Order (Dkt. No. 85), Defendant Comcast Cable Communications, LLC (“Comcast”) and Plaintiff Douglas Lacy (“Plaintiff”), by and through their respective counsel of record, respectfully submit this further joint status report and case management plan.

I. Background and Statement of the Case

Plaintiff Douglas Lacy (“Plaintiff”) asserts claims against Comcast under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”), for himself and on behalf of a putative class defined as “[e]ach person within the United States who (1) received a non-emergency call to his or her cellular telephone; (2) from Comcast and/or its agents on behalf of Comcast; (3) through the use of an automatic telephone dialing system (‘ATDS’) and/or an artificial or prerecorded voice; and (4) which call was directed to a number assigned to a cellular telephone service but not assigned to the intended recipient of the calls.” Plf.’s Second Amended Complaint (“SAC”) (Dkt. No. 46) ¶ 45. Stated differently, the proposed class includes people who received “wrong number” calls, where the person Comcast was intending to call was not the person to whom the phone number was then assigned.

Plaintiff filed this proposed class action on January 4, 2019. (Dkt. No. 1). Comcast moved to compel arbitration. Plaintiff disputed that his claims fell within the scope of any purported arbitration agreement, but agreed that an arbitrator could determine the threshold “scope” question. (Dkt. No. 4). The arbitrator ruled that Plaintiff’s claims were outside the scope of the arbitration agreement. (Dkt. No. 40 at Ex. 1). Comcast then moved to dismiss and transfer this case to Pennsylvania. (Dkt. No. 48). On March 26th, the Court denied Comcast’s motion to dismiss. (Dkt. No. 59).

Comcast filed its Answer and affirmative defenses to the SAC on April 9, 2020. See Comcast’s Answer (Dkt. No. 61); Order Lifting Stay and Confirming Arbitration Award (Dkt. No. 47). Through its Answer, Comcast, among other things, “denies all liability, denies that Plaintiff or the putative class suffered any actionable harm for which Comcast is liable, denies that certification of this action is appropriate under Rule 23 of the Federal Rules of Civil Procedure, and denies that Plaintiff or the putative class are entitled to any relief whatsoever.” Answer ¶ 45.

1 Comcast asserts that the Plaintiff's receipt of "wrong number" calls was the result of human error
 2 when the number was input to its systems, so that Plaintiff cannot represent a purported class that would
 3 be dominated by holders of so-called "reassigned numbers"—numbers previously held by a Comcast
 4 customer who forfeited the number such that it was reassigned to a new user who did not consent to
 5 receive calls from Comcast. Plaintiff responds that Comcast has produced no evidence to support its
 6 claim that the calls to the Plaintiff were the result of a clerical input error and has also argued that the
 7 cause of a wrong number call is irrelevant to liability under the TCPA and class certification.

8 In March and April 2020, the parties filed cross-motions concerning discovery and case
 9 management. Specifically, on March 12, 2020, Comcast moved for a stay of the action pending the
 10 Supreme Court's decision in *Barr v. American Association of Political Consultants, Inc.*, No. 19-631,
 11 cert. granted (U.S. Jan. 10, 2020) ("Barr"), a case in which the constitutionality of the TCPA was
 12 challenged. In the alternative, Comcast sought a protective order preventing disclosure of, among other
 13 things, personally identifiable information ("PII") of all of its current and former subscribers—including
 14 call data with names, addresses, and telephone numbers—pursuant to the federal Cable Communications
 15 Policy Act of 1984, 47 U.S.C. § 551 *et seq.* (the "Cable Act"). *See* Comcast's Motion for a Stay or, in
 16 the Alternative, for a Protective Order (Dkt. No. 56) (seeking protective order from disclosing call
 17 records including current or former subscriber PII on the grounds that such information is protected by
 18 federal law from disclosure). Particularly given Comcast's privacy concerns, Comcast argued that
 19 wholesale production of call data is unnecessary and not proportional given Plaintiff's unique
 20 experience.

21 Plaintiff opposed Comcast's motion to stay and for a protective order and filed an affirmative
 22 motion to compel discovery of all of Comcast's call data over a four-year period. *See* Plf.'s Opp'n to
 23 Comcast's Motion to Stay (Dkt. No. 57); Plf.'s Motion to Compel (Dkt. No. 62) (seeking Comcast's
 24 production of its call data, including, the "(1) date and time of the call; (2) telephone number called; (3)
 25 telephone number placing the call; (4) dialing equipment used to place the call; (5) entity that placed the
 26 call; and (6) name and contact information for the intended recipient (i.e. the Comcast subscriber
 27 associated with the telephone number called).").

1 On April 28, 2020, the Court (Leighton, J.) stayed this action pending the Supreme Court's
 2 decision in *Barr*. *See Order* (Dkt. No. 70). The Supreme Court issued its decision in *Barr* on July 6,
 3 2020, striking down a part of the TCPA but finding the unconstitutional component severable and
 4 upholding the remainder of the statute. In response, Comcast's counsel¹ and Plaintiff's counsel resumed
 5 meet-and-confer discussions on discovery, case management and scheduling.

6 On July 9, 2020, just two days after the *Barr* decision, the Supreme Court granted certiorari in
 7 *Facebook Inc. v. Duguid*, No. 19-511, cert. granted (U.S. July 9, 2020) ("*Duguid*"). Comcast then moved
 8 to continue the stay pending the Supreme Court's decision in *Duguid* and the Court (Leighton, J.) denied
 9 the motion by order dated August 13, 2020. *See Stay Order*, Dkt. No. 82 (August 13, 2020). In its Order
 10 lifting the stay, the Court held:

11 Second, Lacy convincingly argues that, regardless of *Duguid*'s outcome,
 12 discovery will need to take place in this case regarding (1) the existence and
 13 exact nature of any ATDS used to contact Lacy, (2) whether Comcast called
 14 Lacy and other potential class members using a pre-recorded voice, and (3)
 15 whether such calls were directed to cell phone numbers other than that of
 16 the intended recipients.

17 *Id.* at 3:5-9 (citing Plf.'s Compl.). In addition, the Court explained:

18 Comcast makes no showing that these issues have been addressed through
 19 the discovery that has already taken place. Indeed, before this case was
 20 stayed, the parties had filed motions disputing Comcast's obligations to
 21 respond to Lacy's discovery. Until the Supreme Court decides *Duguid*,
 22 Comcast should be spared from ATDS-related discovery that may prove
 23 superfluous and dispositive motions on certification or liability should be
 24 delayed. However, this appears achievable and is more desirable than
 25 staying the case in its entirety. The Motion is therefore DENIED and the
 26 stay is LIFTED.

27 *Id.* at 3:9-15.

28 ¹ In late May 2020, certain of Comcast's counsel, including counsel submitting the meet-and-confer
 29 declaration on the pending motion for protective order, withdrew from this matter (Dkt. Nos. 74, 75, 76) due to a
 30 change in law firms, and the Court (Leighton, J.) on June 8, 2020 granted *pro hac vice* admission to incoming
 31 counsel (Dkt. No. 77). Comcast has at all times been represented by the same law firms in this matter.

1 The parties thereafter continued to meet and confer in light of the Court's Order, and requested
 2 time to submit to the Court a further joint status report with a joint or competing proposals for a revised
 3 case schedule. *See* Joint Status Report (Dkt. No. 84).²

4 **II. Proposed Case Management Plan**

5 Consistent with the Court's Stay Order, the parties propose that discovery proceed first as it
 6 relates to calls made with a prerecorded voice, with any further ATDS-related discovery, if necessary,
 7 following the Supreme Court's decision in *Duguid*. The parties propose the following case deadlines:

EVENT	DEADLINE / DATE ³
Deadline to complete fact discovery relating to: (1) Plaintiff, (2) prerecorded voice calls, (3) prerecorded call scripts, and (4) the technology used to place all calls at issue in this case.	January 31, 2021
Deadline to complete fact discovery relating to ATDS-related calls	Later of 90 days after the Supreme Court's decision in <i>Duguid</i> or July 30, 2021
Deadline for Plaintiff to file motion for class certification with expert reports	90 days after the deadline to complete fact discovery relating to ATDS-related calls ⁴
Deadline for Comcast to file opposition to motion for class certification with expert reports.	60 days after Plaintiff's deadline to file motion for class certification with expert reports
Deadline for Plaintiff to file reply in support of class certification with rebuttal expert reports.	60 days after Comcast's deadline to file opposition to motion for class certification with expert reports
Hearing on class certification	To be set by the Court

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 25 ² As set forth in the parties' prior submission, the dates set forth in this Court's prior Minute Order Setting
 26 Pre-Certification Deadlines (Dkt. No. 53) are moot.
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3 ³ As relates to the deadlines set forth herein, "days" are calculated pursuant to Federal Rule of Civil
 Procedure 6.

4 ⁴ Plaintiff may also move for class certification prior to the Supreme Court's decision in *Duguid* but no
 earlier than March 12, 2021. Comcast reserves the right to oppose the timing and propriety of such a motion in
 light of the Court's Order lifting the stay.

Trial and pretrial deadlines	To be scheduled once Plaintiff's motion for class certification is determined
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The parties are continuing to work in good faith to resolve any disagreements concerning discovery. The parties expressly reserve all arguments raised in their prior discovery motions, and will advise the Court as to any need for a decision on any of the issues raised in those prior motions, in which case the parties anticipate a need to refresh the briefing. To further facilitate such discovery, Comcast is working with Plaintiff on proposals to handle the treatment of PII and any disclosure in discovery of such information as specified in 47 U.S.C. § 551.

Dated: October 16, 2020

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ORDER

Pursuant to the case schedule submitted in the parties' Joint Status Report, the Court sets the following pre-certification deadlines:

EVENT	DEADLINE / DATE ⁵
Deadline to complete fact discovery relating to: (1) Plaintiff, (2) prerecorded voice calls, (3) prerecorded call scripts, and (4) the technology used to place all calls at issue in this case.	January 31, 2021
Deadline to complete fact discovery relating to ATDS-related calls	Later of 90 days after the Supreme Court's decision in <i>Duguid</i> or July 30, 2021
Deadline for Plaintiff to file motion for class certification with expert reports	60 days after the deadline to complete fact discovery relating to ATDS-related calls ⁶
Deadline for Comcast to file opposition to motion for class certification with expert reports.	60 days after Plaintiff's deadline to file motion for class certification with expert reports
Deadline for Plaintiff to file reply in support of class certification with rebuttal expert reports.	60 days after Comcast's deadline to file opposition to motion for class certification with expert reports
Hearing on class certification	To be set by the Court
Trial and pretrial deadlines	To be scheduled once Plaintiff's motion for class certification is determined

IT IS SO ORDERED.

Dated: October 19, 2020.

RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE

⁵ As relates to the deadlines set forth herein, "days" are calculated pursuant to Federal Rule of Civil Procedure 6.

⁶ Plaintiff may also move for class certification prior to the Supreme Court's decision in *Duguid* but no earlier than March 12, 2021. Comcast reserves the right to oppose the timing and propriety of such a motion in light of the Court's Order lifting the stay.